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No. 86-795

In The

Supreme Court of the United States

October Term, 1986

WESTMAC, INC.,

Petitioner,

vs.

LON SMITH, SMITH BROTHERS VELTE & COMPANY, SMITH BROTHERS VELTE & COMPANY, d/b/a SUNFIELD FARMERS ELEVATOR COMPANY, BERT POST, MINOR WALTON BEAN COMPANY, FRANK E. BOWLES, POTTERVILLE ELEVATOR COMPANY, MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC., and ALL MEMBERS, STOCKHOLDERS and OFFICERS OF MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED

IN THE CONTEXT OF A *NOERR-PENNINGTON* DEFENSE TO AN ALLEGED SHERMAN ACT VIOLATION, IS THE TEST FOR "SHAM" LITIGATION EMPLOYED BY THE SIXTH CIRCUIT CONSISTENT WITH THE SHAM TEST SANCTIONED BY THE SUPREME COURT AND UTILIZED IN OTHER CIRCUITS?

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COUNTER-STATEMENT OF THE CASE

Respondents[1] take exception to the argumentative portions of Petitioner's statement of the case. Respondents accept the non-argumentative portions subject to the exceptions and additions here noted.

1. Petitioner asserts, without record support, that Respondents' real purpose in filing the state court lawsuit was to "coerce Westmac, Inc. into joining their anti-competitive price fixing conspiracy * * *". (Petition, p 5). In fact, no anti-competitive price fixing conspiracy was established, or even suggested, by the evidence presented, despite more than three years of discovery.

Indeed, Petitioner has abandoned its price fixing claim as well as all of its remaining anti-trust claims except the one relating directly to the state court action. Petitioner has stipulated that it has incurred no damages except increased interest expenses and attorney fees allegedly caused by the EDC bonding delay, which was in turn allegedly attributable to Respondents' state court constitutional challenge to the Michigan EDC statute. (See March 28, 1985 Stipulation, p 9a).

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[1] This Brief is filed on behalf of all Respondents named in the caption except Minor Walton Bean Company. Respondents state upon information and belief that Minor Walton Bean Company has settled with Petitioner and is no longer a party to this action.

Pursuant to Rule 28.1, Respondents state that Smith Brothers Velte & Company is a subsidiary of American Bean and Grain Co.; Potterville Elevator Company's elevator has been leased to Anderson's, a partnership of Maumee, Ohio, diversified agribusiness marketer and; Mid-Michigan Farm and Grain Association, Inc. has no parent, subsidiary or affiliated companies.

2. Respondents, during the course of their efforts to lobby against subsidized financing for the proposed Westmac project, made no objection whatsoever to the establishment of the competing facility so long as it was financed through normal commercial channels. (Petition, p 65a).

3. The assertions made by the Respondents during their lobbying campaign that construction of a competing facility by means of subsidized financing would have a severe economic impact upon existing grain elevators were proven by events to be quite correct.

4. Petitioner's present economic difficulties are traceable to management practices and the general economic decline in the field of agriculture, not to the fact that it paid commercial, as opposed to subsidized, interest rates for a period of fifteen months back in 1981-1982.

5. Halting the sale of Clinton County Economic Development Corporation (EDC) bonds was one of the direct and immediate objectives of the lawsuit that Respondents brought in Clinton County Circuit Court. Petitioner asserts that the suit was brought for the "ostensible purpose" of challenging the EDC enabling act, but with the "real purpose" of preventing the sale of the EDC bonds, thus abusing the judicial process. In fact, barring the officers of the Clinton County EDC from executing the bonds was one of the stated objectives of the suit. The complaint filed August 5, 1981 is described on its face as a "Complaint for Mandamus and Declaratory Judgment". Paragraph 3 of the prayer for relief reads as follows:

> "3. That the court issue an order in mandamus prohibiting the defendants or any other persons serving

> as officers of the Clinton County EDC from executing bonds, notes, loan agreements or other documents intended to assist in the financing or support of the Westmac grain elevator project." (pp 3a-4a).

6. Petitioner's reference to an alleged conversation between Respondent Frank Bowles and Westmac, Inc. President John Williams during the pendency of the state court appeal is incomplete and misleading. Petitioner states that "Frank Bowles, indicated to Westmac, Inc. that if Westmac, Inc. implemented the uniform 'prices' in the Central Michigan Grain market that Respondents' opposition to the EDC financing would cease and the appeal of the state court lawsuit would be dismissed." (Petition, pp 6-7).

To the extent that statement is intended to imply "price fixing" on the part of Respondent Bowles and the other Respondents, it is improper. According to the testimony and affidavit of Petitioner's own president, John Williams, Mr. Bowles referred only to a "two-price" system under which an elevator receives a higher price than a producer when it sells grain to another elevator. That system, which compensates the selling elevator for costs incurred in transporting, grading, drying, cleaning and elevating grain sold to another elevator is entirely lawful and is a common practice.

Petitioner also failed to reveal that Mr. Bowles was not a member of defendant Mid-Michigan Farm and Grain Association, Inc. at the time the conversation occurred, having resigned from it more than a year before, which Mr. Williams knew at the time of the conversation, as appears from his affidavit. (Affidavit of John R. Williams,

Petition, pp 40a-48a, paragraph 12). Mr. Bowles was not a party to the EDC litigation at the time the conversation occurred. Further, according to Mr. Williams' own testimony, Mr. Bowles merely expressed his own belief or opinion that the lawsuits could be settled, and did not state or imply that he spoke in a representative capacity for any of the members of Mid-Michigan.

Indeed, the Sixth Circuit determined that the conversation between Mr. Bowles and Mr. Williams was an immaterial circumstance. The Court stated at footnote 10 (Petition, p 13a, fn 10):

> "We do not consider the conversation between plaintiff's president and Bowles, a former member of the Mid-Michigan Farm and Grain Association, that upon certain conditions the latter 'believed' or 'felt' that he might get the group to drop its appeal and effect a settlement to [be] a material circumstance precluding a grant of summary judgment. *In granting summary judgment the District Court gave plaintiff's contentions the benefit of the doubt. It assumed an 'attempt to influence official decision making' and 'anti-competitive purpose' on the part of defendants, but it held this behavior to be protected and exempted from anti-trust claims because defendant's actions, particularly in bringing about the constitutional challenge in Court, were not an 'abuse of governmental process', nor 'unlawful lobbying activities', nor 'sham' litigation.* * * *" (Emphasis added).

7. The summary judgment dismissal of Petitioner's federal antitrust claim has not prejudiced Petitioner's state court claims based on alleged violations of state antitrust law and abuse of process. (Petition, p 73a).

8. Respondents take exception to Petitioner's purported summary of the opinions of the District Court and

the Sixth Circuit Court of Appeals in this matter. Respondents submit that Petitioner's summary of the decisions is incomplete and misleading. Respondents will address those decisions in the Argument section of this brief.

ARGUMENT

A. The Test for the "Sham" Exception to Noerr-Pennington Applied by the Sixth Circuit is Consistent with the Test Applied by This Court and Other Circuits, and Petitioner Failed to Come Forward with Evidence that Respondents' State Court Constitutional Challenge Fit Within that Exception.

The Role of Intent

After nearly five years of litigation, Petitioner still does not understand that anti-competitive intent is *not* relevant to the question of whether the suit that Respondents brought to challenge the constitutionality of the previously untested EDC statute was a sham, that is, an abuse of the judicial process. The *Noerr-Pennington* doctrine *expressly* protects the legitimate use of the judicial process *regardless of anti-competitive motive.* Thus, as stated in *Razorback Ready Mix Concrete Co., Inc. v Weaver,* 761 F 2d 484, 487 (8th Cir. 1985), "a defendant's invocation of adjudicative process to press legitimate claims is protected *even though its purpose in doing so is to eliminate competition.*" (Emphasis added).

Petitioner relies heavily upon Judge Merritt's dissenting opinion in the Sixth Circuit decision. But even

Judge Merritt, in footnote 4 of his dissent, recognized Petitioner's "mistaken view of the sham exception" with regard to intent. (Petition, p 20a). Nonetheless, Petitioner persists at page 9 of its Petition in its misapprehension of the law, suggesting that "the basic reason for the existence of the 'sham' exception" is the protection of only those litigants who bring lawsuits with pure intent.

Petitioner's contention that it is entitled to a Writ of Certiorari because it was denied the opportunity to plead intent to a jury is peculiar when one recalls that the District Court, in ruling on the summary judgment motions, *assumed* that Respondents had an anti-competitive intent in bringing the state court action, yet the Court found no genuine issue of material fact because Petitioner failed to present evidence that Respondents had abused the judicial process so as to come within the sham exception. The Sixth Circuit affirmed on the same basis.

The opinion explored numerous *Noerr-Pennington* cases on the issue of sham and took cognizance of, and affirmed, criteria gleaned from authoritative case law dealing with sham litigation, such as:

> (a) "[I]mproper attempts to influence the government or the courts that are a 'mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.'" *California Motor Transport Co. v Trucking Unlimited,* 404 U.S. 508, 511; 92 S Ct 609; 30 L Ed 2d 642 (1972). (Petition, p 4a).
>
> (b) Behavior that is "an integral part of conduct that violates a valid statute or constitutes an abuse of process." *Id.* at 514-515. (Petition, p 5a).

(c) Litigation filed "*solely* to harass and not to win a favorable judgment." *Winterland Concessions Co. v Trela*, 735 F 2d 257, 263 (7th Cir, 1984), quoting *Grip-Pak, Inc. v Illinois Tool Works, Inc.*, 694 F 2d 466, 472 (7th Cir, 1982), *cert denied*, 461 U.S. 958 (1983). (Petition, p 6a).

(d) Litigation filed "to harm competitors 'not by the *result* of the litigation, but by the simple fact of the *institution* of the litigation.' " *Id.* at 264, quoting *Gainsville v Florida Power & Light Co.*, 488 F Supp 1258, 1265-66 (S.D. Fla 1980). (Petition, p 6a).

(e) Litigation " 'undertaken solely to interfere with free competition and without the legitimate expectation that such efforts will in fact induce lawful government action.' " *Omni Resource Development Corp. v Conoco, Inc.*, 739 F 2d 1412, 1413 (9th Cir, 1984). (Petition, p 7a).

(f) " '[I]llegal reprehensible practices such as perjury, fraud, conspiracy with or bribery of governmental decision makers, or misrepresentation.' " *Razor-Back Ready Mix Concrete Company v Weaver, supra* at 487. (Petition, p 8a).

(g) Litigation "so clearly baseless as to amount to an abuse of process". *Id.* (Petition, p 8a).

The majority specifically noted that, "the sham exception is a 'narrow one' ". (Petition, p 10a). It further agreed with the observation of the Eighth Circuit that "the key to the sham exception is 'an improper interference with governmental process' ". (Petition, p 8a).

Petitioner clearly is bent upon trivializing the well-reasoned holding of the Sixth Circuit majority when it suggests that the appellate court authorized the application of the sham test to "mere allegations" contained

within a filed complaint (Petition, p 14) or to the "form of the pleadings alone". (Petition, p 15). When the trial judge determined that the Respondents' litigation was "a genuine attempt to influence official decision making" (Petition, p 55a), rather than a mere sham, he had before him the written opinions of both the Clinton County Circuit Court and the Michigan Court of Appeals. The litigation he found to be "no sham" had been fully concluded. The trial judge therefore was not applying the sham test to "mere allegations" contained in the complaint.

The District Court and the Sixth Circuit found the Respondents' EDC challenge suit to have been a genuine litigation effort, not because the paperwork was in good order, but because both of the Michigan courts that had dealt with the suit recognized it as raising fundamental and important issues. (Petition, pp 11a, 14a and 54a).[2] The Sixth Circuit also found no evidence that Respondents were attempting to "defeat plaintiff's EDC petition by

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[2] The District Court stated:

> "Judge Tahvonen of the Clinton County Circuit Court certainly did not treat the litigation before him as a sham. In the first page of his opinion he noted that the Complaint 'represents a fundamental and well articulated challenge to the constitutional validity of the Economic Development Corporations Act of 1974. . .' He noted that the questions where of first impression (Opinion, p 1), and praised the 'astute and thorough briefs filed by counsel for all parties. . . .' (Opinion, p 3). He also noted that appellate review of the case 'is likely and perhaps desirable. . .' because of the broad considerations of public policy involved. (Opinion, p 3). *Throughout his 46 page opinion it is evident that Judge Tahvonen took Mid-Michigan's challenges to the EDC Act seriously and as anything but a sham.*" (Petition, p 55a). (Emphasis added).

delay, harassment, or any kind of 'reprehensible practice.'" (Petition, p 12a, fn 9).

Respondents sought injunctive relief to bar the execution of EDC bonds intended to finance the construction and operation of the new grain facility in Central Michigan. Respondents were understandably concerned that Petitioner, through low-cost financing subsidized by the government, could operate with lower overhead and thus could offer farmers higher prices, thereby undercutting other grain dealers in the area. Respondents reasonably viewed the EDC low-interest financing as creating a competitive advantage for Petitioner, and thus challenged the previously untested statute's constitutionality, as well as Petitioner's eligibility under criteria specified in the statute. As the Eighth Circuit noted in *Razorback, supra* at 488, Petitioner "should not have been surprised that its competitors would resort to the use of the courts to prevent it from gaining what they undoubtedly regarded as an unfair competitive advantage in the form of low-cost financing at the expense of the public fisc."

Sham Litigation Test Advocated by Dissenting Judge Merritt

Judge Merritt, in dissent, contends:

> "This case was originally decided by the district court under an erroneous definition of the sham exception." (Petition, p 21a).

He states that:

> ". . . in defining a sham, I would use the elements of the tort of abuse of process, as defined by Dean Prosser. . . ." (Petition, p 16a).

These elements would consist of (1) an ulterior purpose in commencing litigation, and (2) "a willful act in

the use of process not proper in the regular conduct of the proceeding." (Petition, p 16a).

Respondents certainly agree with Judge Merritt that the existence of facts which meet the criteria of an abuse of process as defined by Dean Prosser would raise sufficient indicia of sham as to bar the granting of a *Noerr-Pennington* based dismissal motion. As discussed above, the Federal bench has recognized abuse of process as evidence of sham. To make it the exclusive criteria for the identification of sham litigation, however, would not only put the Sixth Circuit at variance with other Circuits, it would by implication effectively demean a considerable amount of well-reasoned case law. The net gain from such a change would be virtually imperceptible because when a court searches for sham it essentially is already looking for a "willful act in the use of process not proper in the regular conduct of the proceeding." Respondents feel that the more prudent view would be to permit trial courts faced with a *Noerr-Pennington* based summary judgment motion the flexibility to find sham in any of the indicia identified in the precedents, rather than finding sham only on the elements of the tort of abuse of process.

Other Concerns of Dissenting Judge Merritt

Judge Merritt, writing in dissent, took exception to the notion that the existence of an "issue of substance" in a lawsuit is an indication that the suit is not a sham. Respondents note, however, that the Supreme Court has focused on the element of "substance" in identifying sham litigation. The Court has suggested that the sham excep-

tion may apply to "repetitive lawsuits carrying the hallmark of *insubstantial* claims". *Otter Tail Power Co. v United States*, 410 U.S. 366, 380, 93 S Ct 1022; 35 L Ed 2d 359 (1973), *reh den* 411 U.S. 910; 93 S Ct 1523; 36 L Ed 2d 201 (1973). (Emphasis added).

Judge Merritt also expressed concern that there were grounds for believing that Respondents "were attempting to use the litigation process, as opposed to the judgment sought in the suit, as a weapon against [petitioner]". (Petition, p 20a). Respondents recognize that such a misuse of the courts would imply sham. However, it is important to note exactly what the state court litigation sought to achieve:

> (a) A declaration of the unconstitutionality of the previously untested EDC enabling act, based on its apparent conflict with a provision of the Michigan Constitution barring government involvement in private "internal improvements". Const 1963, Art 3, Section 6.[3]
>
> (b) Injunctive relief prohibiting officers of the Clinton County EDC from executing the Westmac bond documents based on (i) the unconstitutionality of the enabling act, and/or (ii) the failure of the Westmac project to meet an important criteria of the enabling act, namely, that a project must effectuate a net increase, rather than decrease, in jobs. (Complaint for Mandamus and Declaratory Judgment, paragraph 7(a) and prayer 3; pp 2a-4a). See MCL 125.1608.

Thus, a prime objective of the litigation was to enjoin the issuance of the bonds because of the unfair and

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[3] "The state shall not be a party to, nor be financially interested in, any work of internal improvement, or engage in carrying on any such work, except for public internal improvements provided by law."

economically destructive competitive advantage that Petitioner would obtain from the low-interest financing Respondents therefore had no illegitimate underlying purpose for the lawsuit; the judgment sought by the Respondents was precisely the same as the actual results that they sought.

Respondents never objected to the construction of the competing elevator and never attempted to enjoin it. The facility was constructed and successfully put into operation without incident. Respondents' opposition throughout was directed exclusively at the government-subsidized financing, not at the facility itself. The challenge litigation was brought only against an instrumentality of government. Petitioner became involved in it only because it requested to be joined as a party.

Finally, Judge Merritt was concerned about the evidentiary weight of several memoranda and alleged conversations suggested by Petitioner to demonstrate sham. The trial court had found, and the majority of the panel on appeal agreed, that the memoranda on the subject of commencing litigation showed, at best, an anti-competitive intent on the part of Respondent Smith. The Court had already assumed the anti-competitive intent, however, for purposes of ruling on the dismissal motion. Thus, since intent is irrelevant in a *Noerr-Pennington* based defense, the trial court found the evidence unpersuasive. Furthermore, the bond sale delay discussed in the memoranda is totally consistent with one of the stated purposes of the suit, namely the requested injunction seeking a prohibition (i.e. permanent delay) of the bond sale.

Further, with regard to the conversation between Respondent Bowles and Westmac president John Williams

previously discussed herein, both the dissenting opinion of Judge Merritt and Westmac's Petition for Certiorari are based on an attempt to second-guess a trial judge who had far greater exposure to the parties than has been available, or ever will be available, at the appellate level.

Consistency of the Sixth Circuit's Sham Litigation Test With That Used in Other Circuits

Petitioner would have the Court believe that the Sixth Circuit majority utilized a test for sham litigation which differs from that utilized in other circuits. This is not correct, as will become evident in the following brief review of the cases cited by Petitioner in support of its claim.

1. *Rickards v Canine Eye Registration Foundation,* 783 F 2d 1329 (9th Cir, 1986). This case does not propose a test for sham that differs in any way from that used by the Sixth Circuit in *Westmac v Lon Smith.* It cites the standard *Noerr-Pennington* cases, including *Clipper v Rocky Mountain Motor Tariff Bureau, Inc.,* 690 F 2d 1240 (9th Cir, 1982) which was cited by the trial court below. It also relies on *Omni Resource Development Corporation v Conoco, Inc.,* 739 F 2d 1412 (9th Cir, 1984), which was also relied on by the majority of the Sixth Circuit panel.

2. *Hospital Building Co. v Trustees of Rex Hospital,* 791 F 2d 288 (4th Cir, 1986). The Fourth Circuit relied on Professor Areeda's treatise, *Antitrust Law,* paragraph 203.1a (Supp 1982). Respondents concur wholeheartedly with Areeda's observations on what constitutes sham litigation. There is no inconsistency between his observations and the standards utilized by the Sixth Circuit. In describing the test for sham (Section 203.1c) he notes that

it must be objective (i.e. behavior oriented), rather than subjective (i.e. intent oriented):

> "Again, however, the inquiry into subjective intent is hazardous and of doubtful utility in most cases. As a matter of principle, furthermore, it seems wise policy to hold business actors to a standard of reasonable care in using governmental machinery.
>
> "The critical issue in applying the sham exception therefore becomes one of determining what constitutes an objectively reasonable invocation of governmental machinery."

Hospital Building Co., supra, also confirms that "the complainant in an antitrust case has the burden of proving that its competitor's conduct was a sham." *Id.* at 292-293.

3. *SJ Advanced Technology & Manufacturing Corp. v Junkunc,* 627 F Supp 572 (N.D. Ill. 1986). This case does not discuss sham criteria in any meaningful way. The party which the Court felt should have pled the *Noerr-Pennington* defense did not even bother to plead it. Respondents will not burden the Court with a discussion of this case.

4. *Central Telecommunications, Inc. v TCI Cablevision, Inc.,* 800 F 2d 711 (8th Cir, 1986). The sham test embraced by the Eighth Circuit in *Central Telecommunications* is precisely the same one used by the Sixth Circuit. It described "the essence of the 'sham' exception" in the following question:

> "Were defendant's petitioning activities genuine attempts to influence government action, or were they designed to directly interfere with the business relationships of a competitor?". *Id.* at 725.

5. *Litton Systems, Inc. v American Telephone and Telegraph Co.*, 700 F 2d 785 (2nd Cir, 1983), *cert denied*, 104 S Ct 984 (1985). Like the Fourth Circuit in the *Hospital Building Co.* case discussed above, the Second Circuit embraced Professor Areeda's test for sham. *Id.* at 810.

Areeda on Sham

Petitioner has cited Professor Areeda as a recognized authority on antitrust law, including the *Noerr-Pennington* Doctrine and the sham exception to that doctrine. Respondents join Petitioner in urging the Court to give great weight to Areeda's observations on the issue of what constitutes sham litigation. Respondents note the following comments of this recognized authority:

> "The mere fact that the antitrust defendant was unsuccessful in the other forum does not mean that it was unreasonable of him to pursue his interest there.
>
> * * *
>
> "*A claim cannot be thought frivolous* or otherwise unreasonable *where the other tribunal considered it very seriously* and deliberately before ultimately rejecting it. (Areeda, *Antitrust Law*, Section 203.1e). (Emphasis added).

In other words, if a court regards a case highly enough to give it serious and deliberate consideration, that fact alone is a credible indicator of the quality of the suit. Did the Michigan courts show that kind of regard for the litigation which Respondents brought challenging the EDC bonding statute? Indeed they did. As noted by the Sixth Circuit majority, "the state courts consider the suit to present substantial issues", (Petition, p 13a) and

"as raising an important legal question". (Petition, p 14a).

Professor Areeda continued on to make another observation of immense relevance to the question of whether the litigation undertaken by Respondents constituted a baseless or sham suit. He noted that the Federal District Court in *Outboard Motor Corp. v Pezetel,* 474 F Supp 168 (D. Del 1979), "found no sham where the non-antitrust suit had survived a motion to dismiss". (Section 203.1e). Was the EDC challenge litigation brought by Respondents —and claimed by Petitioner to be a baseless sham—ever put to the acid test of a dismissal motion? It certainly was. On two separate occasions when the case was on appeal to the Michigan Court of Appeals, Westmac made motions to have the case dismissed. It made a motion to dismiss on the ground of mootness (since the bonds had been sold), and that motion was denied by the Michigan Court of Appeals on January 24, 1983. (pp 7a-8a). It also made a motion to affirm the lower court judgment (thus effectively ending the appeal), and the Michigan Court of Appeals denied that motion on February 28, 1983. (pp 5a-6a). The Michigan Court of Appeals recognized the case as one of first impression and of great importance to the jurisprudence of the state. Clearly, the case was not sham litigation.

B. The Sixth Circuit Correctly Held that Since Respondents' State Court Action Raised a Legal Issue of Genuine Substance, it Created a Rebuttable Presumption that the Lawsuit was a Serious Attempt to Obtain a Judgment on the Merits.

The Sixth Circuit stated:

> "We hold that when a lawsuit raises a legal issue of genuine substance, it raises a rebuttable presumption that it is a serious attempt to obtain a judgment on the merits instead of a mere sham or harassment. *The first amendment interests concerned and the case law discussed earlier support placing the evidentiary burden on the anti-trust plaintiff to prove that the action of the defendant comes within the sham exception to Noerr-Pennington in this kind of case.* * * *
> "On these essentially undisputed facts, we find defendants' state suit to have raised a substantial issue of state law. We may therefore presume that defendants filed the suit as a genuine attempt to obtain a judgment on the merits, even if they also intended to prevent plaintiff from obtaining a tax and economic benefit as a potential competitor." (Petition, pp 10a-11a). (Emphasis added).

Petitioner claims, in essence, that the presumption applied by the Sixth Circuit somehow deprived Petitioner of the opportunity to establish its antitrust case against Respondents. For example, Petitioner asserts at page 9 that "price-fixers are given a green light to make full use of the Federal and State Court systems to coerce and force their competitors to join price maintenance conspiracies

so long as they are shrewd enough to plead an 'issue of substance' or 'colorable claim'."[4]

Petitioner's arguments reflect a basic misconception regarding the presumption applied by the appellate court. Petitioner ignores the fact that the presumption is a *rebuttable* one, and that the trial court and the appellate court gave Petitioner every opportunity to come forward with evidence of a sham, but Petitioner failed to do so.

The rebuttable presumption applied by the Sixth Circuit does not alter the sham test in any way. As the Court pointed out, it is merely an evidentiary rule to aid in the application of the test:

> "The dissent implies that by creating the presumption in the present case we are immunizing from government regulation the challenged conduct which concededly may have an anti-competitive effect. But we have not 'immunized' defendants' conduct in the present case because we have afforded the plaintiff an opportunity to demonstrate that defendants' state court suit was something other than a serious challenge to the validity of the state law relied upon by plaintiff to obtain a special tax benefit. * * * We merely are creating an evidentiary presumption to facilitate the applicability of the sham exception." (Petition, p 14a, fn 12).

Placing the evidentiary burden on the anti-trust plaintiff to come forward with evidence showing that the sham

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[4] Contrary to the assertion of the dissenting opinion, the majority in no way held that a mere "colorable claim" contained in a litigant's complaint can immunize an ensuing lawsuit from the Sherman Act. Nowhere in the majority opinion is the phrase "colorable claim" even used. The majority, what's more, spoke in terms of a "lawsuit", not a mere complaint.

exception applies is neither unfair nor inconsistent with established procedural law.

In *Smith v Northern Michigan Hospitals,* 703 F 2d 942, 947-948 (6th Cir, 1983), the Court applied a summary judgment standard that is consistent with the approach taken by the Sixth Circuit and the District Court in the instant case:

> "Once the defendant has adequately rebutted the plaintiff's allegations by establishing legitimate alternative explanations for its conduct which disprove the inferences the plaintiff seeks to draw, then the plaintiffs must come forward with some 'significant probative evidence tending to support the complaint'. *First National Bank* [*of Arizona v Cities Service Co.*], 391 U.S. at 290, 88 S Ct at 1593." (Footnote omitted).

In the instant case, the rebuttable presumption arising from the state court action that raised legal issues of genuine substance is merely the equivalent of finding that the Respondents had established a legitimate alternative explanation for their conduct. Thus, the burden was on Petitioner to come forward with evidence showing that the state court lawsuit was nothing more than a sham. Petitioner failed to provide such evidence, and thus summary judgment was appropriate. Thus, the Sixth Circuit's use of the rebuttable presumption is consistent with established law.

Further, the Sixth Circuit's presumption parallels similar language in a Ninth Circuit opinion concerning an allegedly baseless patent infringement suit:

> "The jury should be instructed that a patentee's infringement suit is presumptively in good faith and

that this presumption can be rebutted only by clear and convincing evidence." *Handgards v Ethicon,* 601 F 2d 986 (9th Cir, 1979), *cert denied,* 444 U.S. 1025 (1980).

Even if error occurred in using the rebuttable presumption, Petitioner is not entitled to relief because, in any event, Petitioner had the burden to come forward with evidence to support its claim, and, as both the District Court and the Sixth Circuit held, Petitioner failed to carry that burden.[5]

———o———

CONCLUSION

In summary, the Respondents, concerned about the viability of the enterprises they had spent their lives establishing, lobbied county and township officials to disapprove government subsidized low-interest tax free bonds for a proposed competing facility. They argued to no avail that the state legislature never intended the EDC law to put existing businesses in jeopardy. Administrative remedies exhausted, and personally convinced that the government which they had supported for years with their taxes should not now be the instrumentality of their destruction, they took the *only* other route open to them, namely, litigation to challenge the previously untested enabling act. (The Michigan Attorney General had previously declared two of the Act's provisions *unconstitutional.* Attorney General Opinion No. 5047, June 11, 1976, p 495).

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[5] As noted by the trial court (Petition, p 55a), the EDC statute authorizes litigation by persons in the area of a project who believe they will be adversely impacted by it. MCL 125.1621. Such statutory authorization lends significant weight to the Sixth Circuit's presumption.

The challenge suit was a work of scholarship and was pled in the least destructive way that it could have been pled consistent with stated objectives. Every effort was made to expedite the litigation and appellate review.

Since a lawfully enacted statute is presumed to be constitutional, no actual legal impediment stood in the way of the bond sale. Respondents cannot be held responsible for the independent decision of bond buyers to postpone their purchase pending appellate review. (It is certainly conceivable also that the bond buyers' attorneys advised them that the constitutional challenge had merit).

The majority of the Sixth Circuit panel upheld the carefully considered opinion of the trial court dismissing Petitioner's attack on Respondents' constitutionally protected effort to petition the government for a redress of grievances. After thoughtfully reviewing well established precedent, the Sixth Circuit majority concurred with the trial judge that Respondents' activities did not constitute an abuse of the judicial system. The criteria they employed in testing for sham were totally consistent with criteria utilized in other Circuits. Petitioner is not entitled to a Writ of Certiorari from this Court.

Respectfully submitted,

Ray Foresman (P 13574)
Curtis R. Hadley (P 32160)
Counsel of Record
Attorneys for Respondents Bowles and Potterville Elevator

Douglas R. Inglis (P 15336)
Attorney for Respondents Mid-Michigan and Bert Post

Richard A. Guilford (P 14463)
Attorney for Respondents Smith and Smith Brothers Velte & Co.

APPENDIX

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CLINTON

Mid-Michigan Farm and Grain Association, Inc., a Michigan Corporation

v

Dyle Henning and Donald Lowell, respectively, in their capacities as President and Secretary of the Economic Development Corporation of the County of Clinton

Complaint for Mandamus and Declaratory Judgment

Case No. 81-3038 AW

Douglas R. Inglis (P 15336)
Attorney for Plaintiff

NOW COMES the Mid-Michigan Farm and Grain Association, Inc. by and through its attorney Douglas R. Inglis, and makes and files this Complaint for Mandamus and Declaratory Judgement and offers allegations in support thereof as follows:

1. That the plaintiff is a nonprofit Michigan corporation.

2. That the defendants, Dyle Henning and Donald Lowell are residents of Clinton County and serve respectively as president and secretary of the Economic Development Corporation of the County of Clinton, hereinafter referred to as the "Clinton County EDC".

3. That the Clinton County EDC is a public corporation established in Clinton County pursuant to the economic de-

velopment corporations act, 1974 PA 338, MCLA 125.1601 et seq; MSA 5.3520(1) et seq.

4. That the Clinton County EDC is authorized by law to participate in the financing of certain economic development projects, and through its board of directors has given approval for participation by the Clinton County EDC in the financing of a grain elevator and railroad loading facility in Eagle Township of Clinton County, pursuant to an application from Westmac, Inc., a Michigan corporation.

5. That substantially all of the procedural steps which are required for the participation of the Clinton County EDC in the financing of the Westmac grain elevator have been taken and the approvals of the necessary municipal bodies have been obtained.

6. That for the Clinton County EDC to issue a bond, note or loan agreement to finance the Westmac project, the signatures of the defendants would be required.

7. That for the defendants, or any other officers of the Clinton County EDC, serving as such, to execute financial instruments to assist in the financing of the Westmac project would be legally improper because:

(a) The requirements of the enabling statute, 1974 PA 338, as amended, have not been complied with;

(b) The legality of the Clinton County EDC's participation in the Westmac project is dependant in part on the validity of 1980 PA 501, amending 1974 PA 338, and said amendatory act is unconstitutional;

(c) The legality of the Clinton County EDC's participation in the Westmac project is dependant upon

the validity of 1974 PA 338, and said enabling statute is unconstitutional.

8. That a detailed explanation of the grounds supporting plaintiff's case is contained in the memorandum of law which accompanies this complaint.

9. That the plaintiff represents grain elevator operators in Clinton and Eaton Counties, and that said operators are potential business competitors of the Westmac corporation.

10. That the competitive advantage which the Westmac corporation will gain through the financing assistance of the Clinton County EDC will cause irreparable injury to the existing grain elevator operators represented by plaintiff, and that plaintiff has no adequate and speedy remedy at law.

WHEREFORE PLAINTIFF PRAYS:

1. That the court issue a declaratory judgement holding that Act No. 501 of the Public Acts of 1980 is unconstitutional.

2. That the court issue a declaratory judgement holding that Act No. 338 of the Public Acts of 1974, as amended, is unconstitutional.

3. That the court issue an order in mandamus prohibiting the defendants or any other persons serving as officers of the Clinton County EDC from executing bonds, notes, loan agreements or other documents intended to

assist in the financing or support of the Westmac grain elevator project.

Lon Smith, President
Mid-Michigan Farm and Grain Association, Inc.

Douglas R. Inglis (P 15336)
Attorney for Plaintiff
4111 E. Packard Hwy.
Charlotte, Michigan 48813

STATE OF MICHIGAN)
) ss.
COUNTY OF CLINTON)

On this day of , A.D. 1981, before me, a Notary Public in and for said County, personally appeared Lon Smith, to me personally known and made oath that he has read the foregoing Petition by him subscribed and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be on his information and belief and as to those matters he believes them to be true.

Notary Public
My commission expires .....

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN. Held at the Court of Appeals in the City of Grand Rapids, on the 28th day of February in the year of our Lord one thousand nine hundred and eighty-three

Present the Honorable

Thomas M. Burns
Presiding Judge
Glenn S. Allen, Jr.
Donald E. Holbrook, Jr.
Judges

Docket No. 61546
L.C. No. 81-3038-AW

MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC.,

Plaintiff-Appellant,

v

DYLE HENNING and DONALD LOWELL, Respectively, in their capacities as President and Secretary of the Economic Development Corporation of Clinton County and WESTMAC, INC., a Michigan corporation,

Defendants-Appellees.

In this cause plaintiff-appellant has filed a brief on the merits in support of an appeal, and defendants-appellees having filed a motion to affirm pursuant to GCR 1963, 817.5(3), and an answer in opposition having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion to affirm be and the same is hereby DENIED for failure to persuade the Court that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 2nd day of March in the year of our Lord one thousand nine hundred and eighty-three.

/s/ Ronald I. Dzierbicki
Clerk

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN. Held at the Court of Appeals in the City of Grand Rapids, on the twenty-fourth day of January in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
Glenn S. Allen, Jr.

Presiding Judge
Daniel F. Walsh

Barbara B. MacKenzie
Judges

No. 61546
L.C. No. 81-3038-AW

MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC.,

Plaintiff-Appellant,

v

DYLE HENNING, and DONALD LOWELL, respectively, in their capacities as President and Secretary of the ECONOMIC DEVELOPMENT CORPORATION OF THE COUNTY OF CLINTON, and WESTMAC, INC., a Michigan corporation,

Defendants-Appellees.

———————/

In this cause defendants-appellees have filed motions to dismiss the appeal, and an answer to the motions having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motions to dismiss be and the same are hereby DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN—ss.

I, Ronald I. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of January in the year of our Lord one thousand nine hundred and eighty-two.

/s/ Ronald I. Dzierbicki

Clerk

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

WESTMAC, INC.,

Plaintiff,

vs. Case No. G81-971 CA

LON SMITH, et al.,

Defendants.

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STIPULATION

The only economic damages claimed by the plaintiff in this action are additional interest expense and additional attorney's fees incurred by the plaintiff for the time period from the 5th of August, 1981 until the 3rd of December, 1982; those dates being the date of the inception of litigation by the defendant Mid-Michigan Farm and Grain and the issuance of the EDC bonds for the Westmac Project. respectively.

Those damages claimed by the plaintiff arise out of those lobbying and litigation activities allegedly taken by defendants which the court has already held to have been protected activities under the Noerr-Pennington Doctrine.

The remaining Antitrust and State Law based claims are not claimed by plaintiff to have given rise to any additional or different economic damages.

/s/ Gary P. Schenk

/s/ Richard A. Guilford

/s/ Frederick M. Baker, Jr.

/s/ Douglas R. Inglis

/s/ David Clabuesch

Dated: March 28, 1985